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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. 60

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, and THE CITY OF LOS ANGELES,
Appellants,

vs.

LOS ANGELES RAILWAY CORPORATION (a corporation),
Appellee.

BRIEF OF APPELLANT, RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

ARTHUR T. GEORGE,
IRA H. ROWELL,
RODERICK B. CASSIDY,
State Building, San Francisco,
Attorneys for Appellant, Railroad Commission of the State of California.

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BRIEF OF APPELLANT, RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

THE OPINION OF THE COURT BELOW.

This case was brought to this Court on direct appeal from an opinion and decree allowing permanent injunction issued by the District Court of the United States in and for the Southern District of California, Southern Division, three judges sitting, pursuant to proceedings had under United States Code, Title 28,

Section 380 (formerly Judicial Code, Section 266). Direct appeal from said decree allowing a permanent injunction is expressly authorized by said section of the United States Code.

The opinion of the Court is officially reported in 29 Federal Reporter (2nd Series) pages 140-148 and appears in the printed record herein at pages 534-549. The decree allowing injunction and injunction appear in the printed record at pages 559-562 and 563-566 respectively.

JURISDICTION.

Pursuant to paragraph one of Rule 12 of this Court appellant Railroad Commission of California and appellant City of Los Angeles duly filed herein their statement as to the basis on which it is contended that this Court has jurisdiction to review the opinion and decree herein.

STATEMENT OF THE CASE.

Appellee Los Angeles Railway Corporation is a public utility street railroad corporation operating in the City of Los Angeles and adjacent territory. The electric lines of said corporation occupy public streets by virtue of one hundred and fourteen (114) franchises, granted to said corporation and its predecessor companies by the Cities of Los Angeles, Vernon and Huntington Park, and the County of Los Angeles. Of the said one hundred and fourteen (114) franchises, (as of December 31, 1926) eighty-one (81) franchises each contain a five cent fare clause with no qualifying

clause providing for a possible change in fare; sixteen (16) franchises, provide that a rate of fare of not more than five cents shall be charged, except upon a showing before a competent authority having jurisdiction over rates of fare, that such greater charge is justified; seven (7) franchises each contain a fare clause specifying other than a flat five cent fare; and ten (10) franchises, each contain no fare clause. (R. 358; 360-381.)

Of the total number of franchises under which Los Angeles Railway Corporation operates, (as of December 7, 1927) one hundred and two (102) were granted by the City of Los Angeles and of said number seventy-three (73) franchises each contain a five cent fare clause with no qualifying clause providing for a possible change in fare. (R. 388; 394-396.) Examples of said type of franchise definitely fixing the rate of fare to be charged at five cents are set forth in full in the record. (Exhibit "C," R. 397-402; Exhibit "D," R. 402-413.) Eighteen (18) of the total number of franchises granted by the City of Los Angeles, all granted subsequent to 1919, contain a provision that the rate of fare shall not exceed five cents per ride except upon a showing before a competent authority having jurisdiction over rates of fare that such greater charge is justified. (R. 388, 397.) An example of this type of franchise is set forth in full in the record. (Exhibit "E," R. 414-424.)

On November 17, 1926, appellee filed with appellant Railroad Commission of California an application for an increase in its rates from the then prevailing flat rate of five cents as fixed in the various franchises

above mentioned, to a basic fare of seven cents cash or four single fare tokens for twenty-five cents. (R. 75-110.) The California Railroad Commission, after conducting a number of hearings thereon, issued its Opinion and Order No. 19521 denying the said application for rate increase. (R. 165-175.)

Thereafter, on June 22, 1928, appellee filed with the District Court of the United States in and for the Southern District of California, Southern Division, its bill of complaint against the Railroad Commission of California. Said bill of complaint was amended on June 28, 1928, and sets forth two alleged causes of action. (R. 8-234.) Plaintiff seeks by its first cause of action to have the Court declare confiscatory the five cent rate of fare which it charges under the various franchises granted to it. (R. 8-53.) By its second cause of action plaintiff seeks to have declared arbitrary and void the above mentioned order of the Railroad Commission of California refusing to increase the five cent rate of fare, on the ground that the Commission did not consider all of the evidence before it and did not make its order with due consideration to the evidence presented to it. (R. 53-72.) It was the prayer of the amended complaint that the existing rates be declared confiscatory, the order of the Railroad Commission be declared void, that said Commission and its officers be enjoined from enforcing or attempting to enforce said order and from interfering with the plaintiff in the charging and collecting of the rates proposed in the amended bill of complaint. (R. 72-74.)

Upon the filing of said complaint, motion was made by plaintiff for interlocutory injunction under United States Code, Title 28, Section 380. (R. 234-235.)

City of Los Angeles on motion duly made was permitted to intervene in said proceeding as party defendant. (R. 238-240.) Both defendants moved to dismiss said amended bill of complaint for want of equity and for various other reasons. (R. 242-252.) Separate answers were filed by said defendants denying all material allegations and alleging that plaintiff company was operating under certain franchises granted by the City of Los Angeles wherein the rate of fare was fixed at five cents per ride; that said franchises constituted contracts binding upon said plaintiff and that said Federal Court was without jurisdiction to grant the relief sought. (Answer of Railroad Commission R. 253-280, particularly R. 274; Answer of City of Los Angeles R. 280-312, particularly R. 282-288.)

Thereafter the said District Court, constituted as provided by United States Code, Title 28, Section 380, heard said motion for interlocutory injunction and said motions to dismiss and evidence was introduced by all parties. At the conclusion of said hearing it was stipulated by all parties that the Court in addition to ruling on said motions might finally determine all issues involved in the amended bill of complaint on the record then before it. (R. 522-524.)

Thereafter the said three judge Court issued its opinion (R. 534-549 and on October 1, 1928, issued its decree allowing permanent injunction. (R. 559-566.)

The Court found the basic five cent fare fixed in the franchises of plaintiff to be confiscatory and held the order of the Railroad Commission denying a rate increase to be void. As a condition of the injunction the Court in its decree authorized plaintiff from and after the entry of the injunction and until final determination of the cause by the United States Supreme Court, to charge and collect not in excess of a basic fare of seven cents cash or four single fare tokens for twenty-five cents, all as prayed for in the amended bill of complaint of plaintiff, and directed that plaintiff issue to each passenger paying such fares a refund ticket or coupon for the excess between the former five cent fare and the rate of fare paid by such passenger. (R. 565.) Under said decree the plaintiff was required to file with the clerk of the Court a surety bond in the amount of $50,000.00 conditioned that if it should ultimately be held by the Supreme Court of the United States that the new rates are unlawful the excess represented by refund tickets or coupons will be refunded by plaintiff upon presentation of such coupons.

Defendants and appellants filed with said Court petition for appeal on October 2, 1928 and on said date order issued allowing appeal. (R. 566-568.) Bond on appeal and a joint assignment of errors were filed by appellants on October 2, 1928. (R. 568-578.)

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

Appellant Railroad Commission of California will urge on this appeal the assignment of errors num-

bered I to XIV inclusive. (R. 569-572.) The said assignment of errors so specified are as follows:

"I.

The Court erred in making the decree.

II.

The Court erred in granting the injunction.

III.

The Court erred in making the decree and in overruling the respective motions to dismiss interposed by defendant Railroad Commission and intervener-defendant City of Los Angeles, for the reason that the relief asked in the amended bill of complaint herein is beyond the power and jurisdiction of the said Court to grant.

IV.

The Court erred in making the decree and in holding that the allegations of the first alleged cause of action in said amended bill of complaint stated a cause of action or raised any federal question over which it had or has jurisdiction, for the reason that said alleged cause of action attacks only the present effective rates of fare in force upon plaintiff's street railway system and fixed in the franchises sold to plaintiff by the City, and does not attack any order or act of the Railroad Commission fixing any fare or fares to be charged by plaintiff.

V.

The Court erred in making the decree and in holding that the allegations of the second alleged cause of action in said amended bill of complaint stated a cause of action or raised any federal question over which it had jurisdiction, for the reason that the said alleged cause of action does not attack any order or act of the Railroad Commission changing or modifying in any manner the rates of fare fixed and established in and by the franchises sold to plaintiff by the City of Los Angeles.

VI.

The Court erred in making the decree and in fixing and/or allowing the charge and collection by plaintiff of rates of fare greater than and different from those fixed and established in and by the franchise-contracts entered into and existing between plaintiff and intervener-defendant City of Los Angeles, and in failing to hold that plaintiff was and is bound by all of the terms and provisions of said franchises, including the provisions for rates of fare, for the reason that said Court did not and does not now possess jurisdiction to change or vary the said rates of fare so fixed and established.

VII.

The Court erred in making the decree and in finding and/or holding that defendant Railroad Commission, either in and by its Decision and Order No. 9029, or otherwise, has ever acted to change the basic five-cent fare in force upon plaintiff's street railway system, for the reason that the record herein discloses upon its face that said decision and order never did and never has become an effective decision and order of said Commission, and was and is ineffectual for any purpose whatsoever, and further for the reason that the record discloses upon its face that the Railroad Commission has never made, issued or promulgated any order, decision or rule changing the rates of fare upon plaintiff's street railway system.

VIII.

The Court erred in making the decree and in failing to hold that plaintiff entered into valid and binding contracts with the City of Los Angeles when it purchased its franchises and filed approved bonds for the faithful performance of all terms thereof.

IX.

The Court erred in granting the decree and in failing to hold that plaintiff is bound by the

rate provisions in each of its franchises purchased from the City unless or until said provision should be changed by lawful and effective order of the Railroad Commission; and in failing to hold that plaintiff under and by its said franchise-contracts limited itself to charging a basic five-cent fare, subject to change only by the police power of the State, as a part of its consideration for the grant to it of the right to operate a street railroad on the streets of said City.

X.

The Court erred in making the decree and in finding and holding that defendant Railroad Commission had or has acted to change, alter or affect the rates fixed in and by the franchise-contracts, or any of them, entered into and existing between plaintiff and the City of Los Angeles.

XI.

The Court erred in making the decree and in finding and holding that a failure and refusal by defendant Railroad Commission to change the rates fixed in and by the franchise-contracts entered into and existing between plaintiff and the City, either by its Decision and Order No. 19,521, or otherwise, is either a complete or any exercise of that Commission's power over the rates specified in said franchises, for the reason that such failure and refusal to change said rates did not and could not operate to affect said rates, or any of them, in any manner, or to give the said Court jurisdiction thereover.

XII.

The Court erred in making the decree and in finding and holding that the denial by defendant Railroad Commission of plaintiff's application (No. 13,323) for authority to increase its rates of fare constituted such action or any action with regard to said rates as to give to said Court any jurisdiction or authority over said rates.

XIII.

The Court erred in making the decree and in finding and holding that the denial by defendant Railroad Commission, of the application of plaintiff for increased rates in the proceedings which resulted in the prosecution of this cause 'followed as it was and is by the necessary effect of enforcing the rate, was an exercise of jurisdiction and that a situation was created wherein the power of the Federal Court to enjoin, if confiscation is effected by the order, is ample,' for the reason that no action was or has been taken by defendant Railroad Commission, which would operate to change or alter any of the rates fixed in and by the franchise-contracts entered into and existing between plaintiff and the City of Los Angeles.

XIV.

The Court erred in making the decree and in holding that the Federal Court may exercise or force the exercise of the police power of a state either to change the terms of or to abrogate the franchises sold to plaintiff by the City of Los Angeles, or otherwise."

ARGUMENT.

In arguing that the Court erred in the particulars above specified in the recited assignment of errors appellant Railroad Commission of California will advance the following propositions:

I. Appellee's franchises are contracts.

II. The City of Los Angeles possessed authority to make such contracts and impose rate conditions and provisions therein.

III. Where a valid contract fixing rates has been entered into between a city and a public utility there is no confiscation.

IV. The contracts here were binding as between the parties until the Commission exercised the power delegated to it by the Legislature by increasing the contract rate in the manner provided by the Public Utilities Act of California.

V. The Court erred in holding that the Railroad Commission by its orders of 1921 and 1928 abrogated the rates fixed in the various franchise contracts in question.

I. APPELLEE'S FRANCHISES ARE CONTRACTS.

The record shows that of a total of one hundred two (102) franchises granted to the Los Angeles Railway Corporation and its predecessors in interest by the City of Los Angeles, seventy-three of them provide in substance that the grantee of the franchises shall have the right to charge five cents and no more as fare for any distance over said road, or any of its branches, while eighteen (18) of them, all granted subsequent to 1919, provide in substance that the grantee shall charge not to exceed five cents per ride, except upon a showing before a competent authority having jurisdiction over rates of fare, that such greater charge is justified. (R. 388.) Practically all franchises granted by the City of Los Angeles to said company and its predecessors in interest prior to the year 1919 contain a provision of the type first mentioned, that is, definitely providing that the rate of fare shall not exceed five cents per ride. (R. 387-436; particularly Exhibit "C," R. 397-402 and Exhibit "D," R. 402-413.) An example of such a franchise

is Ordinance 2532 (NS) granted in 1894 and now in full force and effect, which provides in part as follows (R. 397):

"Provided, that in all cases where this franchise is granted over streets now occupied by other lines of street railway owned by persons or corporations, whether named herein or not, that said W. D. Larabee, and his assigns, shall have the right to operate over any and all such tracks *in accordance with and limited only by the statutes of the state of California applicable there to;* and in case the gauge of the tracks of said other persons or corporations shall not conform to the gauge of the tracks of said W. D. Larabee, or his assigns, then the said W. D. Larabee, or his assigns, shall be permitted to lay a third rail over the distance traversed by said two roads jointly." (Italics ours)

"Section 3. *That the rate of fare for any distance along said road or its branches, one way, shall not exceed 5 cents for one passenger,* and shall transfer at connecting points on the lines of said grantee or his assigns or lines which said grantee or his assigns may operate so as not to return passengers in the general direction from which they came, and that persons under eighteen years of age who attend the public schools of said city, shall be required to pay but half fare, provided said pupils shall purchase their tickets in quantities of at least one dollar's worth at a time; such tickets to be available only between the hours of 8 a. m. and 6 p. m., in actual passage to and from school; and said grantee, or assigns, shall sell such tickets whenever requested to do so by a pupil who shall present a certificate from a teacher approved by the Superintendent of Schools of the City, that he or she is such pupil of said schools.

"And further, that said grantee, or assigns, shall carry policemen and firemen and letter carriers, Mayor and Councilmen, free on said cars

when on duty, subject at all times to the rules of the road.

"Provided further, that said grantee, or assigns, shall, on or before December 15th, of each year, pay to the City Tax and License Collector, the annual license upon each car fixed by the existing ordinance of said city.

"Section 4. The above rights and privileges are granted upon the express condition that work upon that portion known and described as the Kuhrts-Street Line of said road and the line from Estrella Avenue to the west city limits on Washington Street shall be commenced within sixty days, and completed, equipped and in operation as an electric road for its full length within eight months from the date hereof. The remaining portion of said railroad line shall be fully equipped and completed as provided herein within two years from the date of the approval of this ordinance. *Provided further, that this franchise is granted upon each and every condition herein set forth, and a failure to comply with each or any of said conditions shall work an immediate forfeiture of all the rights herein granted.*

"Section 5. *The said grantee or assigns is hereby required to file a written acceptance of the terms and conditions hereof* with the City Clerk of said City within thirty days after the passage of this ordinance, together with a bond of not less than ten thousand dollars, for the faithful carrying out of the terms of this franchise." (Italics ours.)

All such franchises granted to the Los Angeles Railway Corporation by the City of Los Angeles were granted in accordance with the provisions of various general franchise acts requiring the city to advertise and sell the privilege to operate railways upon the public streets to the highest bidder. Further reference will later be made to such statutes. It is suffi-

cient at this time to note that from such offers by the City of Los Angeles and the acceptance thereof by the grantee, and from the terms of the above quoted franchise ordinance and those of similar ordinances set forth in the record (R. 357-413) it is apparent that the respective parties intended that such franchises should constitute contracts binding upon them in all respects during the terms of the grants.

It has been the unanimous holding of the Courts that franchises from municipal corporations for the operation of street railway lines over their streets are contracts, and as such are subject to the general principles of contract law. In *Columbus Railway and Power Company v. City of Columbus* (1919), 249 U. S. 399, 408, the Supreme Court of the United States definitely held that such franchises constitute binding contracts and in that regard stated:

> "upon acceptance of the ordinance it became a binding contract, governed by the rates of fare authorized to be charged during the period of twenty-five years for which the ordinance ran; that the rates contracted for became binding upon the city, and could not be altered by subsequent municipal action consistently with the constitutional rights of the railway company."

We shall later quote at length from this case in connection with our discussion of the effect of such a contract. At this point suffice it to say that this determination does not stand alone but is representative of the unanimous holdings of the Courts in relation to such franchises. Thus, in the earlier case of *City of Cleveland v. Cleveland City Railroad Company,* (1904) 194 U. S. 517, 536, the Supreme Court declared of a similar franchise ordinance:

> "* * * we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might be thereafter charged."

The question as to the nature of a franchise sold by a municipality and accepted by a public utility has been before the Supreme Court and appellate courts of the State of California several times, and on each occasion, these Courts have held such franchises to be contracts.

The case of *Los Angeles Railway Company v. Los Angeles,* (1907) 152 Cal. 242 involved the question of a forfeiture of a franchise granted to the plaintiff by the City of Los Angeles. The railroad sought to enjoin defendant city from interfering with the railroad in exercising its alleged franchise rights after it had failed to construct a part of its road in accordance with the terms of said franchise contract. The lower court refused to grant the railroad an injunction, which holding was affirmed by the Supreme Court. In its decision at page 244 the Supreme Court states:

> "It is argued in support of this view that nothing is involved in this controversy beyond the respective rights of the plaintiff and defendant growing out of and dependent upon *the ordinance granting the franchise, which, it is contended, embraces all the terms of the contract,* and which upon the received construction of grants providing for forfeitures upon breach of conditions subsequent, means no more than that their breach entitles the grantor to maintain an action to enforce the forfeiture. The respondent, on the other hand, contends that section 502 of

the Civil Code in force at the date of the grant *is a part of the contract,* and that it is self-executing in working a forfeiture for failure to complete the construction of the road within the time specified in the ordinance.

"We agree with the appellant that the rights of the parties are measured by the terms of their contract, but we think the statute (Civ. Code, sec. 502) enters into the contract, and that its provisions must be taken into account *in construing the contract.* The city in granting a street-railway franchise is but an agency of the state, and if there were any conflict between the ordinance containing the grant and the general laws of the state, the latter would govern. In this case, however, there is no conflict." (Italics ours.)

In the case of *St. Helena v. San Francisco etc. Railway,* (1914) 24 Cal. App. 71, the city had granted the railroad a franchise to operate its street cars upon the streets of the city but did not provide for the paving of the street between its tracks. Thereafter the city, desiring to improve an entire street passed an ordinance requiring the street to be paved between the tracks by the railway company. This action was brought by the city to require the railway company to comply with the provisions of that ordinance. The railway company contended that said ordinance violated the terms of the franchise granted to it, which constituted a contract as to all of its terms binding upon both parties. The Court stated in part (page 74):

"It is not disputed that said franchise constitutes a contract that is binding upon both parties, but it is claimed by appellant—and justly so under the authorities—that in case of doubt as to

the interpretation of said franchise it must be construed in favor of the municipality and against the railroad.

"The first consideration that attracts attention is the provision in the *contract* that the franchise is granted 'subject to all laws or municipal regulations now in force, or that may be hereafter enacted relating to the control, or use, digging in or occupying of the public streets.' Of course, regardless of such agreement, it is well settled that the municipality cannot abdicate its functions or by contract divest itself of power to control the streets for the benefit of the public. 'The improvement, regulation and control of the highways within a municipality call for the exercise of a delegated governmental power, a function which the municipality itself, neither by an ordinance nor by contract, can surrender or impair.' (*McNeil v. City of South Pasadena,* 166 Cal. 153, (135 Pac. 32).)

"But the parties to the said franchise saw fit to stipulate expressly that the valuable privilege granted should be subject to all laws and municipal regulations that might be adopted in pursuance of this power of control and regulation that is committed to the municipal authorities. It is difficult to understand how the parties could have expressed more clearly such intention.

* * * * * * *

"The fact that these matters of detail *are not specified in the contract* cannot, of course, impair or affect the power of the municipality in the exercise of its control of the streets to impose such regulations. As suggested by appellant, it is plain that the franchise is not a limitation of the power of the municipality in these matters, *but it is rather a limitation upon the power of the railroad* and any doubt about authority in the premises must be resolved in favor of the municipality." (Italics ours.)

A petition was filed in the Supreme Court to have the case heard there. The Supreme Court denied the petition and made the following comment (page 80):

> "The respondent, in support of its petition, contends that the franchise under which the respondent is operating does not require it to pave the streets, but only to grade them and keep them in proper repair between the tracks and for two feet on each side thereof, and that the police power does not embrace the authority to compel a street railway occupying the streets of a city to pave the streets, between its tracks, or elsewhere, or at all; *that such power must be founded upon the contract between the city and the company whereby the franchise is granted, or upon some valid contract obligation of the company.* It is unnecessary to consider whether or not the terms of the franchise of the defendant requires it to pave the streets. The franchise was granted under the provisions of section 498 of the Civil Code and that section requires street railroads to 'plank, pave, or macadamize the entire length of the street, used by their track, between the rails, and for two feet on each side thereof.' This can only mean that such company must either plank, pave, or macadamize that part of the street, as the proper city authority may lawfully direct. *It is a constituent part of the contract granting the franchise,* though not expressed therein in terms. The company is therefore bound by contract to pave the street in accordance with the city ordinance, and it is not necessary to say whether or not the city, by virtue of its police powers alone, could compel it to do so." (Italics ours.)

In the case of *City of San Diego v. Kerchhoff,* (1920) 49 Cal. App. 473 the City had brought an action to recover on a bond given to insure the performance of the terms of a franchise granted by the

city for the construction of a railroad. The Court stated at page 481:

> "The franchise of a street railroad finds its origin in the action of the municipality—*it is a contract between the city and the grantee.*" (Italics ours.)

A decision similar to the one last mentioned is that of *Albany v. United States Guaranty & Fidelity Company,* (1918) 38 Cal. App. 466 wherein an action was brought to recover upon a bond for failure to construct a railroad in accordance with the terms of a franchise. The Court at page 468 stated:

> "At the instant of the grant of the franchise, (a street railway franchise) the franchise became an *irrevocable contract* and the property of E. A. Gowe, of which he could not be divested by the city of Albany for a period of four months, during which time he was to commence work." (Italics ours.)

Thus, in numerous decisions we find that the California Courts have held franchises to be contracts. It is true that none of the cases above cited specifically rule upon the power or authority of cities in California or the City of Los Angeles, in particular, to contract in street railway franchises as to rates of fare to be charged. There are no California decisions ruling upon this specific point. However, the fact that the City of Los Angeles possessed and now possesses such authority to contract as to rates becomes apparent upon a consideration of certain California statutes. We shall now turn to an analysis of these legislative enactments.

II. THE CITY OF LOS ANGELES POSSESSED AND NOW POSSESSES AUTHORITY TO MAKE SUCH CONTRACTS AND IMPOSE RATE CONDITIONS AND PROVISIONS THEREIN.

Under the law of California the City of Los Angeles possessed and now possesses authority to enter into franchise contracts with public utility street railroad companies and impose in such contracts provisions and conditions with reference to the rates of fare to be charged.

By Section 470 of the Civil Code of California it is provided:

> "No railroad corporation must use any street, alley or highway, or any of the land or water, within any incorporated city or town, unless the right to so use the same is granted by a two-third vote of the town or city authority from which the right must emanate." (Enacted Mar. 21, 1872.)

Section 497 of the Civil Code of California provides in part:

> "*Authority to lay railroad tracks through the streets and public highways of any incorporated city, city and county, or town, may be obtained for a term of years not exceeding fifty,* from the trustees, council, or other body to whom is intrusted the government of the city, city and county, or town, *under such restrictions and limitations, and upon such terms and payment of license tax, as the city, city and county,* or town authority may provide." (Italics ours.) (Calif. Stats., 1891, p. 12.)

Section 501 of the Civil Code of California provides:

> "The rates of fare on the cars must not exceed ten cents for one fare for any distance under three miles, and in municipal corporations of the first class must not exceed five cents for each pas-

senger per trip of any distance in one direction either going or coming, along any part of the whole length of the road or its connections. The cars must be of the most approved construction for the comfort and convenience of passengers, and provided with brakes to stop the same, when required. A violation of the provisions of this section subjects the corporation to a fine of one hundred dollars for each offense." (Cal. Stats. 1903, p. 172.)

In the sale of street railroad franchises pursuant to the above cited Civil Code provisions the City of Los Angeles has been governed in its procedure by various franchise acts. Prior to 1893 no definite procedure for the sale of franchises to the highest bidder had been provided by the legislature. The Franchise Act of 1893 (California Statutes 1893, p. 288), however, provided a definite procedure to be followed in the sale of such franchises and read in part as follows:

"Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate railroads along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by the Board of Supervisors, Common Council, or other governing or legislative body of any county, city and county, city, town, or district within this State, shall be granted upon the conditions in this Act provided, and not otherwise. The fact that an application for such franchise or privilege has been made to such Board of Supervisors, Common Council, or other governing or legislative body, together with a statement that it is proposed to grant the same, must first be advertised in one or more daily newspapers of the county, city and county, city, town, or district wherein the said franchise or privilege is to be exercised. Such advertisement must continue every day for at least ten days, and must com-

mence at least thirty days before any further action of the Board of Supervisors, Common Council, or other governing or legislative body. The advertisement must state the character of the franchise or privilege proposed to be granted, the term of its continuance, and, if a street railroad, the route to be traversed, and the day on which tenders will be received for the same. On the day so stated, the Board, or other governing or other legislative body herein mentioned, must meet in open session and read the tenders. The franchise or privileges must then be awarded to the highest bidder; provided, however, that nothing in this section shall affect a special privilege granted for a shorter term than two years."

The Franchise Act of 1893 was twice amended in 1897 (California Statutes 1897, pages 135 and 176.)

In 1901 the Legislature enacted a new franchise act (Stats. 1901, p. 265) which dealt with this same subject. Thereafter in 1905 (Stats. 1905, p. 777) an entirely new act was adopted which repealed the former acts. This later enactment, known as the Broughton Franchise Act, was amended in 1909 (California Stats. 1909, p. 125,) and in 1915 (California Stats. 1915, p. 1300.)

By the 1915 amendment to the Broughton Franchise Act it was expressly provided as follows:

"Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for light, heat or power, to erect poles or wires for transmitting electricity for light, heat or power, along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted

by boards of supervisors, boards of trustees or common councils, or other governing or legislative bodies of any county, city and county, city or town within this state, except steam railroads and except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise. *The grantor may, however, in such franchise impose such other and additional terms and conditions not in conflict herewith, whether governmental or contractual in character, as in the judgment of the legislative body thereof are to the public interest.*" (Amendment approved June 8, 1915, Stats. 1915, p. 1300.) (Italics ours.)

There is no necessity of developing at length or in detail the effect of the other above mentioned amendments. Suffice to say that since 1893 the City of Los Angeles, in granting franchises, has been required by law to *sell* franchises granted by it for the use of its streets. Under the procedure prescribed, when application is made for a franchise the city advertises that it will make a sale of such franchise granting the rights desired in said application. The notice of sale sets forth all the terms and conditions upon which the franchise will be sold. The franchise is awarded to the highest bidder and an ordinance is passed definitely defining the rights granted to the purchaser and the terms and conditions of such grant. Upon acceptance by the grantee this franchise becomes a binding contract. The purchaser and grantee upon acceptance are bound by all the terms and conditions contained in the franchise.

The City of Los Angeles is a chartered city and has been governed since 1850 by a charter approved by

the State of California. The earliest charter with which we need be concerned in this proceeding is the charter of 1889 (California Stats. 1889, p. 455), adopted by the city and approved by the legislature in that year pursuant to the provisions of Section 8, Article II of the California Constitution. By an amendment to said charter of 1889, approved by the legislature in 1905 (California Stats. 1905, p. 994), the City of Los Angeles was expressly authorized by the State to insert in franchise contracts provisions and conditions fixing for the term of the grant the rate of fare to be charged. The said charter amendment of 1905 provided in part:

> "*No franchise, right or privilege in, on, through, across, under or over any street, avenue, alley, bridge, viaduct or other public place, and no other franchise whatever, granted by the city to any corporation, association or individual, shall be granted except by an ordinance passed by vote of two-thirds (2/3) of the whole council, nor for a longer period than twenty-one years.* Such grant and any contract in pursuance thereof shall provide that at the option of the city, declared not more than three (3) years nor less than six months before the termination of such grant, the plant and property, if any, belonging to or used by the grantee, or his or its successors in interest, in the streets, avenues and other public places shall, at the termination of said grant, upon the payment of a fair valuation thereof, be and become the property of the city; but the grantee shall be entitled to no payment because of any valuation derived from the franchise. Provided, however, that such option shall not be exercised unless at the time of exercising the same the city shall be authori[illegible]nd empowered to acquire and operate such [illegible]ant and property. *Every grant shall specify the mode of determining any valuation therein provided for and the time and*

mode of payment, and shall make adequate provision by way of forfeiture of the grant or otherwise to secure efficiency of public service at reasonable rates and the maintenance of the property in good order throughout the term of the grant."

The above quoted provision of the city charter continued in force until 1911 when it was superseded by further amendment to Section 2 of said charter of 1889 (California Stats. 1911, pages 2051, 2061, 2063.) Subdivisions 12 and 30 of Section 2 of said charter as amended in 1911 provided as follows:

"Sec. 2—The city of Los Angeles, in addition to any other powers now held by, or that may hereafter be granted to it under the constitution or laws of the state, shall have the right and power:

12—"To fix and collect rates or charges for the use of and for all products of, or service by, any public utility conducted or operated by the city.

30—"To fix and determine the rates or compensation to be collected by any person, firm or corporation, for water, gas, electric current, refrigeration, heat, light, power, telephones, telephone service or connections, or the conveyance of passengers or freight, by means of street railway cars, hacks, cabs, or other cars or vehicles for hire, or for the products of, or service by, any other public utility operated or conducted within the city limits; and to prescribe the character and quality of any public utility service."

The delegation of power to regulate rates of public utility street railroad companies *first* given to the City of Los Angeles by the above quoted charter amendments was further augmented in 1911 by the amendment of the California Constitution, Section 19,

Article XI, adopted October 10, 1911, which amendment provided in part as follows:

> "Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises or both. *Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof.* * * *" (Italics ours.)

It is interesting to note that prior to the adoption of the above quoted charter amendments of 1911, the charter of 1889 did not give to the City of Los Angeles power to regulate the rates of fare charged by public utility street railway companies operating within the city. Nor did any other provision of law grant to the City of Los Angeles, prior to 1911, such power to regulate rates. It was only logical, therefore, that the charter amendment of 1905 above quoted should expressly authorize the City of Los Angeles, in the granting of franchises for the use of streets, to "make adequate provision by way of forfeiture of the grant or otherwise to secure an efficiency of public service at reasonable rates and the maintenance of the property in good order throughout the term of the grant." Not then being possessed of the power to regulate rates, the only manner in which the City of Los Ange-

les could possibly secure reasonable rates throughout the term of the grant was by expressly contracting with the grantee of the franchise as to the rate of fare to be charged during the term of the grant.

We respectfully submit that under the California law the City of Los Angeles, in granting franchises to public utility street railroad companies, was authorized by the state to include in such franchises provisions and restrictions as to rates of fare, Civil Code, Section 497 above quoted having expressly delegated to cities authority to grant such franchises "under such restrictions and limitations, and upon such terms * * * as the city * * * may provide." The City of Los Angeles most certainly enjoyed the power to so contract from 1905 to 1911, by virtue of the above quoted provisions of the charter amendment of 1905 (California Stats. 1905, p. 994), and during this period no less than twenty franchises were granted to appellee Los Angeles Railway Corporation definitely fixing the rate of fare to be charged at not to exceed five cents per ride (R. 385-397, particularly 396.) And, as above pointed out, the power of the city to contract as to rates of fare delegated under the provision of the California Civil Code, Section 497, was further augmented in 1915 by the amendment of the Broughton Franchise Act (Cal. Stats. 1915, p. 1300.)

In 1914 by the amendment of Section 23 of Article XII of the California Constitution the entire control over rates of public utilities was expressly reserved to the Railroad Commission of California and municipalities were divested of all power over the regula-

tion of rates.[1] In order that street railroad rates of fare theretofore fixed in various franchises might be preserved to the cities and the holders of such fran-

(1) Section 23 Article XII California Constitution as amended in 1914 provides in part as follows:

"* * * The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. From and after the passage by the legislature of laws conferring powers upon the railroad commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this state, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the railroad commission; *provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town as, at an election to be held pursuant to law, a majority of the qualified electors of such city and county, or incorporated city or town, voting thereon, shall vote to retain, and until such election such powers shall continue unimpaired;* but if the vote so taken shall not favor the continuation of such powers they shall thereafter vest in the railroad commission as provided by law; and provided further, that where any such city and county or incorporated city or town, shall have elected to continue any of its powers to make and enforce such local, police, sanitary and other regulations, other than the fixing of rates, it may, by vote of a majority of its qualified electors voting therein, thereafter surrender such powers to the railroad commission in the manner prescribed by the legislature; *and provided, further, that this section shall not affect the right of any city and county or incorporated city or town, to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law.* Nothing in this section shall be construed as a limitation upon any power conferred upon the railroad commission by any provision of this Constitution now existing or adopted concurrently herewith." (Amendment adopted November 3, 1914.) (Italics ours.)

chises Section 27 of the Public Utilities Act (Stats. 1911, Extra Session, p. 18) was amended in 1915 to provide as follows:

> "No street or interurban railroad corporation shall charge, demand, collect or receive more than five cents for one continuous ride in the same general direction within the corporate limits of any city and county, or city or town, except upon a showing before the commission that such greater charge is justified; *provided, that until the decision of the commission upon such showing, a street or interurban railroad corporation may continue to demand, collect and receive the fare lawfully in effect on November 3, 1914.* Every street or interurban railroad corporation shall upon such terms as the commission shall find to be just and reasonable furnish to its passengers transfers entitling them to one continuous trip in the same general direction over and upon the portions of its lines within the same city and county, or city or town, not reached by the originating car." (Stats. 1915, p. 115.) (Italics ours.)

Subsequent to the amendment of 1914 to Section 23 of Article XII of the California Constitution, the city in the granting of franchises to appellee, Los Angeles Railway Corporation, with but few exceptions provided for a rate of fare not to exceed five cents with the qualifying provision that the fare might be changed by a proper showing before a competent authority having jurisdiction over rates of fare (R. 397). An example of this type of provision is found in Exhibit "E" (R. 386, 414, 420, 24th paragraph).

It should be noted that although the amendment of Section 23 of Article XII of the California Constitution in 1914, above quoted, divested the City of Los Angeles of its power of regulation of rates of street

railway companies (which power it had enjoyed since 1911 under the charter amendment and amendment of Section 19 of Article XI of the California Constitution, both above quoted), it did not divest the City of Los Angeles of its power to contract as to such rates in the execution of contractual franchises. In fact it will be noted that said Section 23 of Article XII, after providing that the amendment should not affect the powers of control over public utilities enjoyed by cities, other than the regulation of rates, contained the provision " * * * and provided, further, that this section shall not affect the right of any city and county or incorporated city or town, to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law."

Within six months of the date of the adoption of the amendment of Section 23 of Article XII of the Constitution (adopted November 3, 1914) the California legislature by the 1915 amendment to the Broughton Franchise Act (California Stats. 1915, p. 1300), above quoted, augmented the provisions of California Civil Code Section 497, and again provided in substance that cities should have the power and authority to insert rate of fare provisions in contractual franchises. The statutory amendment of 1915, it will be recalled, expressly provided that cities might insert in franchises for the operation of street railway lines "such other and additional terms and conditions not in conflict herewith, whether governmental or contractual in character, as in the judgment of the legislative body thereof are to the public interest."

The District Court in its opinion expressed some doubt as to whether or not the City of Los Angeles ever possessed the power to contract as to the rates of fare to be charged by street car companies operating within the city. The Court in its opinion states in part:

> " * * * we think it may well be doubted whether the State of California ever delegated power to the city to contract with a public utility on the subject of rates so as to restrict future regulation.
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> * * * * * * *
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> "Section 497 of the Civil Code of California of 1891, page 121, provides that authority to lay railroad tracks through streets of a city could be obtained for a term of years not exceeding fifty, from the council under such restrictions and limitations and upon such terms as the City may provide. By the Franchise Act of 1893 (Cal. Stat. 1893, p. 288), a franchise to construct or operate railroads upon any public street of a city or to exercise any other privilege proposed to be granted by the common council, shall be granted upon the conditions of that act and not otherwise. We perceive no provision in that act by which power is given to the city over rates to be included in any franchise granted. The statute of 1901, page 265, and its amendments provided that municipalities could grant franchises upon the conditions in the act provided and not otherwise, but there were no words expressly delegating power to a city to fix rates by contract, and as said by the Supreme Court in Home Tel. & Tel. Co. v. City of Los Angeles, 211 U. S. 265, the first section of the act contained 'an emphatic caution against reading into the act any conditions' not clearly expressed in the act itself. No decisions of the Supreme Court of the state directly decide the question, and we pass it, merely saying that we are inclined to the view that in

> the absence of an express grant to the city of power to fix binding rates in franchises, no such power exists; nor can it be implied under the language of the act of 1901, or other statutes called to our attention (Stanislaus County v. San Joaquin and K. R. Canal Co., 192 U. S. 200; City of San Antonio v. San Antonio Public Service Co., 255 U. S. 547; San Francisco Oakland Terminal Co. v. City of Alameda, 226 Fed. 889; Knoxville Gas Co. v. City of Knoxville, 261 Fed. 283). It is perfectly clear, we think, that at least since the adoption of the constitutional provision heretofore cited (Sec. 23 of Art. XII, adopted Nov. 3, 1914), any provision with respect to rates in franchises granted since 1914 could not be considered as binding contracts of inviolable nature." (R. 540-541.)

We respectfully submit that the Court in thus expressing doubt as to the power of the city to contract as to rates was in error and failed to properly construe Section 497 of the Civil Code and failed to consider the charter amendment of 1905 and the 1915 amendment to the Broughton Franchise Act, both above quoted. We contend that under these enactments the City of Los Angeles possessed and now possesses the power to contract as to rates of fare in the execution of such street railroad franchises. Thus the decision of the United States Supreme Court in *Home Telephone and Telegraph Co. v. City of Los Angeles* (1908), 211 U. S. 265, cited by the Court, is not applicable in the instant case because of the existence of express statutory authority to the City of Los Angeles to contract as to rates.

It should be pointed out that Section 21 of Article I of the California Constitution of 1879 provides in

part that "no special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislature * * *." This constitutional limitation, of course, imposes no limitation on the power of the legislature of the state to authorize a city to contract as to rates and to fix by contractual franchises rates of fare from which the parties may not recede. This point was expressly ruled upon by this Court in *Opelika v. Opelika Sewer Co.*, 265 U. S. 215, where the Constitution of Alabama provided no law "making any irrevocable or exclusive grants of special privileges or immunities shall be passed by the legislature; and every grant of a franchise, privilege or immunity *shall forever remain subject to revocation, alteration or amendment.*" In that case the contract was sustained as binding *between the parties even though subject to revocation or alteration by the State.* The distinction was clearly pointed out by the Court in the following language:

> "No doubt it is true also that the Legislature could not make such a grant indirectly by giving power to a city to make it. *But we see no reason to doubt that the legislature, without impairing its power to revoke, may give a city power to make a contract from which the city, of its own motion may not recede. The city has not attempted to* recede from it." (p. 218.)

III. WHERE A VALID CONTRACT FIXING RATES HAS BEEN ENTERED INTO BETWEEN A CITY AND A PUBLIC UTILITY THERE IS NO CONFISCATION.

It has been conclusively settled by an unbroken line of decisions of this Court that where there is a contract there is no confiscation.

Detroit v. Detroit Citizens Ry. Co. (1902), 184 U. S. 368, 383, 384, 385, 388;

City of Cleveland v. Cleveland City Ry. Co. (1904), 194 U. S. 517, 533;

Vicksburg v. Vicksburg Waterworks Co. (1907), 206 U. S. 496, 508, 515;

Detroit United Ry. v. Michigan (1916), 242 U. S. 238, 249, 253;

Columbus Ry. & Power & Light Co. v. City of Columbus (1919), 249 U. S. 399, 412, 414;

Southern Iowa Electric Co. v. Chariton (1921), 255 U. S. 539, 542;

San Antonio v. San Antonio Public Service Co. (1921), 255 U. S. 547, 556;

Paducah v. Paducah Railway (1923), 261 U. S. 267, 273;

Georgia Railway & Power Co. v. Town of Decatur (1923), 262 U. S. 432, 437, 438;

City of Opelika v. Opelika Sewer Co. (1924), 265 U. S. 215, 217;

St. Cloud Public Service Co. v. City of St. Cloud (1924), 265 U. S. 352, 354.

"It has been long settled that a state may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term,

not grossly unreasonable in time, and that the effect of such a contract is to suspend, during its life, the governmental power of fixing and regulating the rates. Home Teleph. Co. v. Los Angeles, 211 U. S. 265, 273, 53 L. ed. 176, 182, 29 Sup. Ct. Rep. 50, and cases there cited. And where a public service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory is immaterial." *St. Cloud Public Service Co. v. St. Cloud,* supra, and cases cited.

In *San Antonio v. San Antonio Public Service Company,* supra, Mr. Chief Justice White, in the opinion of the Court, from which there was no dissent, at page 556 said:

"The duty of an owner of private property used for the public service to charge only a reasonable rate, and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. *Where, however, the right to contract exists and the parties, the public, on the one hand, and the private owner, on the other, do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate.*"

In *Vicksburg v. Vicksburg Waterworks Co.,* supra, at page 508, the Court says:

"Holding, then, that the plea of *res judicata* must be denied, had the city authority, under the charter of Vicksburg, passed in 1886, to make a binding contract, fixing maximum rates for water

supply to private consumers for a definite period, thirty years in the present case? The grant of legislative power upon its face is unrestricted, and authorizes the city 'to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks.'

"That a state may, in matters of proprietary rights, exclude itself from the right to make regulations of this kind, or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt. Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; Walla Walla v. Walla Walla Water Co., 172 U. S. 1-7, 43 L. ed. 341-344, 19 Sup. Ct. Rep. 77; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; Freeport Water Co. v. Freeport, 180 U. S. 587-593, 45 L. ed. 679-686, 21 Sup. Ct. Rep. 493.

* * * * * * *

"In the cases generally in this court it will be found that, in determining the matter of contract, the local decisions have been given much weight and, ordinarily, followed. As this is a Mississippi contract, and the power was exercised under the authority of an act of the legislature of that state, we naturally look to the decisions of the courts of that state, particularly to such as had given construction to similar charters at the time the contract was made, with a view to determining the extent of the power conferred."

In *Georgia Railway & Power Co. v. Town of Decatur,* supra, at page 438, the Court says:

"This conclusion, involving, as it does, a construction of the state Constitution and laws and powers of state municipalities, is controlling upon this court, as it has decided many times. See, for example: Old Colony Trust Co. v. Omaha, 230

U. S. 100, 116, 57 L. ed. 1410, 1416, 33 Sup. Ct. Rep. 967; Claiborne County v. Brooks, 111 U. S. 400, 410, 28 L. ed. 470, 474, 4 Sup. Ct. Rep. 489; Richmond v. Smith, 15 Wall. 429, 438, 21 L. ed. 200, 202.

"On the other hand, in deciding the constitutional questions presented, this court will determine for itself whether there is, in fact, a contract, and, if so, the extent of its binding obligations; but will lean to an agreement with the state court. Tampa Waterworks Co. v. Tampa, 199 U. S. 241-243, 50 L. ed. 170-173, 26 Sup. Ct. Rep. 23, and cases cited; Freeport Water Co. v. Freeport, 180 U. S. 587, 595, 45 L. ed. 679, 687, 21 Sup. Ct. Rep. 493; Detroit v. Detroit Citizens' Street R. Co., 184 U. S. 368, 386, 46 L. ed. 592, 607, 22 Sup. Ct. Rep. 410; Milwaukee Electric R. & Light Co. v. Railroad Commission, supra. And considering the question in this light, we see no reason to differ with that court in its view of the validity and binding quality of the contract. The contract being valid, we are not concerned with the question whether the stipulated rates are confiscatory. Southern Iowa Electric Co. v. Chariton, 255 U. S. 539, 542, 65 L. ed. 764, 775, 41 Sup. Ct. Rep. 400; Paducah v. Paducah R. Co. decided February 19, 1923 (261 U. S. 267, ante, 647, 43 Sup. Ct. Rep. 335)."

In *Columbus Railway P. & L. Co. v. City of Columbus,* supra, at page 409, the Court said:

"The contracts were made between the city and the company, and became mutually binding for the period named in the ordinances. This case does not involve the remedies which may be invoked against a street railway company which is or may become insolvent because of conditions arising since it entered into a given contract. The company seeks now by its own action to terminate the contracts, still binding upon it by their terms as to rates of fare to be charged, and

seeks to have the aid of a court of equity by enjoining the city from any further requirement of service under them.

"There is no showing that the contracts have become impossible of performance. Nor is there any allegation establishing the fact that, taking the whole term together, the contracts will be necessarily unprofitable. This case is not like the Denver Waterworks Case, 246 U. S. 178, 62 L. ed. 649, P. U. R. 1918C, 640, 38 Sup. Ct. Rep. 278, and the Detroit Street R. Co. Case, 248 U. S. 429, ante, 341, P. U. R. 1919A, 929, 39 Sup. Ct. Rep. 151, in both of which the franchise to use the streets of the city had expired by limition, and it was sought to require continued operation of a waterworks system in the one case and in the other of a street railway system, under rates which would afford no adequate return to the companies. *In this case the company seeks the aid of a court of equity to avoid contracts duly made and entered into while the same are yet in force.* (Italics ours.)

"We are unable to find in the allegations in this bill any statement of facts which absolves the company from the continued obligation of its contracts unless the facts to which we have referred bring the case, as is contended, within the doctrine of *vis major,* justifying the company in its attempt to surrender its franchise, and be absolved from further obligation.

* * * * * * *

"Particular reliance is had upon the last sentence of the paragraph just quoted. This language was used in interpreting a contract of doubtful import, as the context shows. Such interpretation was made in view of the situation of the parties at the time when the contract was made, and in view of the nature of the undertaking under consideration. It certainly was not intended to question the principle, frequently declared in decisions of this court, that *if a party*

charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail. United States v. Gleason, 175 U. S. 588, 602, 44 L. Ed. 284, 289, 20 Sup. Ct. Rep. 228, and authorities cited; Carnegie Steel Co. v. United States, 240 U. S. 156, 164, 165, 60 L. ed. 576, 578, 579, 36 Sup. Ct. Rep. 342. The latest utterance of this court upon the subject is found in Day v. United States, 245 U. S. 159, 62 L. ed. 219, 38 Sup. Ct. Rep. 57, in which it was said: 'One who makes a contract can never be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking. The modern cases may have abated somewhat the absoluteness of the older ones in determining the scope of the undertaking by the literal meaning of the words alone. The Kronprinzessin Cecilie (North German Lloyd v. Guaranty Trust Co.) 244 U. S. 12, 22, 61 L. ed. 960, 965, 37 Sup. Ct. Rep. 490. But when the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of the obstacles to that extent.'

"In the present case the terms of the contract are not doubtful. The term for which the company was given the right to use the streets of the city was definitely stated, and the terms, including the rates of fare which the company might charge, were explicitly laid down. There is no occasion to interpret general terms in the light of the intention of the parties or the circumstances of the case." (Italics ours.)

In *Southern Iowa Electric Co. v. Chariton,* supra, at page 542, the Court said:

"* * * where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, *the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial.* (Freeport Water Co. v. Freeport, 180 U. S. 587, 593, 45 L. ed. 679, 686, 21 Sup. Ct. Rep. 493; Detroit v. Detroit City R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437, 47 L. ed. 887, 891, 23 Sup. Ct. Rep. 531; Cleveland v. Cleveland City R. Co. 194 U. S. 519, 48 L. ed. 1103, 24 Sup. Ct. Rep. 756; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 273, 53 L. ed. 176, 182, 29 Sup. Ct. Rep. 50; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118; Columbus R. Power & Light Co. v. Columbus, 249 U. S. 399, 63 L. ed. 669, 6 A. L. R. 1648, P. U. R. 1919D, 239, 39 Sup. Ct. Rep. 349)." (Italics ours.)

In *Paducah v. Paducah Ry. Co.,* supra, at page 273, the Court said:

"If the franchise here amounts to a contract binding the company to the fare stated therein as a maximum, as claimed by the city, for the whole franchise term of twenty years, *it cannot complain and there is no ground for relief; and the question whether such rates are too low to give a reasonable return or sufficient is immaterial.*" (Italics ours.)

IV. THE CONTRACTS HERE WERE BINDING AS BETWEEN THE PARTIES UNTIL THE COMMISSION EXERCISED THE POWER DELEGATED TO IT BY THE LEGISLATURE BY INCREASING THE CONTRACT RATE IN THE MANNER PROVIDED BY THE PUBLIC UTILITIES ACT OF CALIFORNIA.

It is conceded by this appellant that the Railroad Commission of California is vested with power to change the rates fixed in various franchises involved herein, and this fact will, no doubt, be conceded by the appellant City of Los Angeles and appellee Los Angeles Railway Corporation. This power of the Railroad Commission is delegated by the State under the California Constitution of 1879, as amended (Secs. 20 and 22 of Article XII, as amended October 10, 1911; Sec. 23 Article XII, as amended November 3, 1914, and the Public Utilities Act of California enacted 1911 (Stats. 1911, extra session, p. 18), reenacted in 1915 (Stats. 1915, p. 115).[2]

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(2) The relevant constitutional and statutory provisions provide as follows:

Section 20 of Article XII of the California Constitution provides:

> "No railroad or other transportation company shall raise any rate of charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the railroad commission provided for in this constitution, that such increase is justified, and the decision of the said commission upon the showing so made shall not be subject to review by any court except upon the question whether such decision of the commission will result in confiscation of property." (Amendment adopted October 10, 1911.)

Section 22 of Article XII of the California Constitution provides in part:

> "* * * Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and

It has been directly held by this Court that the binding effect of such contracts *as between the par-*

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no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission, than the rates, fares and charges which are specified in such tariff. * * *" (Amendment adopted October 10, 1911.)

Section 23 of Article XII of the California Constitution provides in part:

"* * * The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for such commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this constitution. * * *." (Amendment adopted November 3, 1914.)

Section 13 of the Public Utilities Act is as follows:

"(a) All charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful.

"(b) Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable.

"(c) All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable." (Stats. 1915, p. 115.)

Section 27 of the Public Utilities Act provides as follows:

"No street or interurban railroad corporation shall charge, demand, collect or receive more than five cents for one continuous ride in the same general direction within the corporate limits of any city and county, or city or town, except upon a showing before the commission that such greater charge is justified; provided, that until the decision of the commission upon such showing a street or interurban railroad corporation may continue to demand, collect and receive the

ties was not impaired because, under State law or Constitution, the Legislature retained "unfettered power" at any moment to revise the contract rate.

Southern Utilities Co. v. Palatka, (1925) 268 U. S. 232;

Opelika v. Opelika Sewer Co., (1924) 265 U. S. 215;

Henderson Water Co. v. Corporation Commission of North Carolina, (1925) 269 U. S. 278.

In the *Palatka* case the contract was sought to be avoided on the ground that the rate had become non-compensatory and that since the Legislature might at any time intervene and change the contract rate the parties to the contract were no longer bound. This Court held that the power of the Legislature to change the rate did not prevent the *parties* from making a binding contract with respect thereto which would remain binding *as between them* until the rate *had been changed* by State authority. This Court said (page 233):

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fare lawfully in effect on November 3, 1914. Every street or interurban railroad corporation shall upon such terms as the commission shall find to be just and reasonable furnish to its passengers transfers entitling them to one continuous trip in the same general direction over and upon the portions of its lines within the same city and county, or city or town, not reached by the originating car." (Stats. 1915, p. 115.)

Section 63 of the Public Utilities Act provides in part as follows:

"(a) No public utility shall raise any rate, fare, toll, rental or charge or so alter any classification, contract, practice, rule or regulation as to result in an increase in any rate, fare, toll, rental or charge, under any circumstances whatsoever, except upon a showing before the commission and a finding by the commission that such increase is justified." (Stats. 1915, p. 115.)

"The Supreme Court held that the city had power to grant the franchise and to make the contract, and that it had no power, of its own motion, to withdraw, *but it concedes the unfettered power of the legislature to regulate the rates.* On that ground the defendant contends that there is a lack of mutuality, and therefore that it is free, and cannot be held to rates that, in the absence of contract, it would be unconstitutional to impose. The argument cannot prevail. Without considering whether an agreement by the company in consideration of the grant of the franchise might not bind the company in some cases, even if it left the city free, *it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed.* Georgia R. & Power Co. v. Decatur, 262 U. S. 432, 438, 67 L. ed. 1065, 1073, 43 Sup. Ct. Rep. 613; Opelika v. Opelika Sewer Co. 265 U. S. 215, 218, 68 L. ed. 985, 987, 44 Sup. Ct. Rep. 517. Such a notion, logically carried out, *would impart new and hitherto unsuspected results to the power to amend the Constitution or to exercise eminent domain.* There is nothing in this decision inconsistent with Southern Iowa Electric Co. v. Chariton, 255 U. S. 539, 65 L. ed. 764, 41 Sup. Ct. Rep. 400; San Antonio v. San Antonio Pub. Serv. Co. 255 U. S. 547, 65 L. ed. 777, 41 Sup. Ct. Rep. 428; and Ortega Co. v. Triay, 260 U. S. 103, 67 L. ed. 153, 43 Sup. Ct. Rep. 44." (Italics ours.)

In the *Opelika* case the Sewer Company had entered into a contract with the City of Opelika for a period of thirty years, authorizing the Company to charge not in excess of certain specified rates. The Constitution of the State of Alabama provided that no law

"making any irrevocable or exclusive grants of special privileges or immunities shall be passed

> by the Legislature; and every grant of a franchise, privilege or immunity, *shall forever remain subject to revocation, alteration or amendment.*"

Notwithstanding this provision an irrevocable contract for a term of thirty years had been made with the Sewer Company.

The District Court held that no valid contract existed and, accordingly, granted an injunction against the rate. The decree of the District Court was reversed by this Court where the question presented was thus stated:

> "It is to be taken that the present rates, which the plaintiff seeks to increase, are *confiscatory unless the city has a right to insist upon them;* and the question before us is whether the city has that right by contract, or whether its enforcement of them deprives the plaintiff of its property without due process of law, contrary to 14th Amendment of the Constitution of the United States, as alleged in the bill. Cincinnati v. Cincinnati & H. Traction Co., 245 U. S. 446, 62 L. ed. 389, 38 Sup. Ct. Rep. 153. The District court held that there was no valid contract, and issued an injunction as prayed. The city appealed to this court."

It was held that notwithstanding the provisions of the State Constitution referred to, the contract between the City and the Sewer Company, *although subject to revocation by the State*, was valid. The Court, with special reference to this provision of the State Constitution, said:

> "No doubt it is true also that the legislature could not make such a grant indirectly by giving power to a city to make. But we see no reason to doubt that the legislature, *without impairing*

> *its power to revoke,* may give a city power to make a contract *from which the city, of its own motion, may not recede. The city has not attempted to recede from it.*" (Italics ours.)

Again it was said, therefore, that although the Legislature expressly reserved "its *power* to revoke," that fact did not affect the validity of the contract *as between the parties and* that, accordingly, the parties *"of their own motion may not recede."* The paramount right of the Legislature, even in a case where it was conceded to exist, to "revoke" the contract did not affect the inviolability of the contract *as between the parties* until the State *had exercised* that right. It was a right pertaining to the *State* and not pertaining to the *parties.*

In *Henderson Water Company v. Railroad Commission of North Carolina,* supra, the appellant water company, assignee of a franchise from the city obligating it to furnish water at certain fixed rates, sought to increase said charges. Application had been made to the State Corporation Commission for authority to affect the desired increase and partial relief granted with the direction to the company to try the new rates for six months, after which time it might again apply for further relief if the same should be justified.

The company contended that the increase thus granted was not sufficient and brought suit in the District Court of the United States alleging the rate, even as thus increased, to be confiscatory. If the rate were *statutory,* and *confiscatory* under the Federal Constitution, the postponement of full relief for six

months would constitute the denial of a constitutional right, as was apparently conceded by the Court (citing *Oklahoma Natural Gas Co. v. Russell,* 1923, 261 U. S. 290). The plaintiff there contended precisely as the appellee will no doubt contend here, that since the State had established "a regulatory plan" over rates by establishing a Commission having full power over the subject of rates, the failure of the Commission to award relief presented a question arising under the Constitution of the United States. It contended, furthermore, that the delay of six months imposed by the action of the Commission justified a direct appeal to the Federal Courts.

The Court held that since the water company was bound by contract with the city, it was not in a position to assert that the failure of the Commission to grant adequate relief under the statute creating it *constituted any infringement of a constitutional right.* In other words, it was held that the right of the water company "bound by the terms of a contract with the city" to relief by the Corporation Commission "speaking for the state" was not a constitutional right and that, accordingly, the water company did not "have any standing to ask for a fixing of rates in excess of the franchise rights." The Court said (pp. 281-282):

> *"The present case differs from the cases cited (Oklahoma Natural Gas Co. v. Russell,* supra) *in that when the Water Company applied to the Corporation Commission for an order increasing rates, it was bound by the terms of a contract with the city contained in its franchise, to furnish water at a low schedule of rates fixed therein. It was not entitled to any judicial relief from*

> *this situation, however inadequate the rates.* Columbus Railway Company v. Columbus, 249 U. S. 399; Public Service Company v. St. Cloud, 265 U. S. 352. *Only by securing the waiver of the franchise rates by order of the Corporation Commission speaking for the State, did the Water Company have any standing to ask for a fixing of rates in excess of the franchise rates.* Trenton v. New Jersey, 262 U. S. 182. *It was, therefore, plainly within the power and discretion of the Commission after granting partial relief to delay further action in the same proceeding until it could satisfy itself by actual trial to what extent its waiver should go.*" (Italics ours.)

It should be noted that the statute under consideration in the *Henderson* case (Sec. 1066 of the Consolidated Statutes of North Carolina of 1919) provided:

> "COMMISSION TO FIX RATES FOR PUBLIC UTILITIES. Subject to the provisions as to passenger rates in the chapter of railroads and as to railroad freight rates in this chapter the Commission shall make reasonable and just rates and charges in intrastate traffic and regulate the same."

The Supreme Court of North Carolina had accordingly decided that the Corporation Commission had jurisdiction to increase, *as it had in fact in that case increased* (but not to the extent demanded) the rates established by the contract made before the enactment of the regulatory statute. (*Corporation Commission v. Henderson Water Co.,* 190 N. Carolina, 70.) By that decision, which was referred to by this Court in its opinion, the Supreme Court of North Carolina held that the Corporation Commission was

> "vested by law with power and authority to fix and establish any and all rates which it (the Water Company) may charge for services rendered by it. When the corporation commission is called upon by either the corporation or those to whom the services are rendered under its franchise to exercise this power and authority it is its duty to fix and establish just and reasonable rates to be charged for such services."

This Court held that since the water company was bound by the contract with the city, even though that contract was subject to jurisdiction of the Commission, it was not entitled to relief under the Constitution of the United States, but must secure relief from the Commission, if at all; the fact that partial waiver of the contract rate had been made was not enough to convert the contract rate into a statutory rate.

This precise question was considered in *City of Manitowoc v. Manitowoc & Northern Traction Co.,* (1911) 145 Wis. 13 (129 N. W. 925), cited and quoted with approval by this Court in *Milwaukee Electric Railway & Light Co. v. Railroad Commission,* (1915) 238 U. S. 174. There a contract had been executed between the municipality and the utility corporation limiting the rate of fare to ten cents. The Statute of Wisconsin, however, which was substantially the same as the Public Utilities Act of California created a Railroad Commission with powers which were also substantially identical with the *regulatory* powers of the California Commission. It was, therefore, contended by the utility corporation that its contract with the city for an unremunerative rate of fare had become invalid and that it was therefore entitled to charge a "reasonable" fare. The Court held that the contract remained

valid *as between the parties* until modified by the Commission and that *the enactment of the statute providing for reasonable rates and the creation of the Commission to apply that standard* did not invalidate the contract. The Court said:

> "No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. *The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer.* To this extent and to this extent only is the contract before us a valid subsisting obligation."

Holding, however, that the statute did *not* invalidate or modify the contract until *action* had been taken by the Commission, the Court said:

> *"Whether the state has exercised its right to modify this rate remains to be considered.* Chapter 362, Laws 1905, applies to interurban railway companies. In re Application of Chapter 362, Laws 1905, to Certain Street Railways, 1 Wis. R. R. Com. Rep. 178. *By that statute (section 3) it is provided that all charges made by any carrier coming under its provisions 'shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.'* Railway Companies are required (section 4) to file their tariffs with the Railroad Commission, and are prohibited from making changes therein except on ten days' notice, and the rates fixed in such tariffs are declared to be the lawful rates until changed as provided by the Act. * * *
>
> *"It is contended that this law has superseded the contract involved in this suit and that therefore the contract no longer has any binding force or effect. We do not think so. The statute worked no change in existing rates. It simply*

provided that all rates should be reasonable, and left to the Railroad Commission the power to determine the fact as to whether or not a given rate was reasonable. When the determination was reached the law became operative upon the particular rate called in question, and the rate arrived at then became the lawful rate and continued so until set aside in the manner provided by the law. The Railroad Commission has made no determination in the case before us; at least, if it has it is no part of the record. Until that determination is made, the contract is in force. When it is made, the contract is superseded, if the rate is changed. * * *

"This is a question which calls for the exercise of legislative policy and discretion. *The Court cannot relieve the defendant from an improvident contract,* but the contract is of such a character in the present instance that the legislative branch of the government may, in the interest of the public, abrogate it. * * *

"The judgment of the circuit court is reversed, and the cause is remanded, with directions to enter judgment enjoining the defendant from changing the rates of fare between the cities of Manitowoc and Two Rivers provided for in the ordinance of November 24, 1902, *until such time as such rates are changed by the Legislature, or through a legislative agency in the manner provided by law.*"

To the same effect was the decision in *Monroe v. Detroit M. & T. Short Line R. Co.,* (1915), 187 Mich. 364, 153 N. W. 669, where there was a contract between the City and the utility corporation. It was contended for the Company that the State Utility Act operated as a revocation of any power the city might have had to contract concerning the service to be furnished by the Company. Referring to this contention the Court said:

> "The rule that contracts such as the one here involved *are made subject* to the necessities of police regulations is recognized by this Court."

Continuing, however, the Court said:

> "It does not follow that because the contract may yield to the exigency of public necessity, *when such exigency has been determined in a proper case and manner,* by competent authority, that the respondent, a party to the contract, may ignore the contract obligation, plead the public or its own convenience as an excuse *and remit the relator to a commission for relief.* On the contrary, it seems wholly reasonable that it should perform its contract obligations *until relieved therefrom by competent authority.*"

In *Salt Lake City et al v. Utah Light & Traction Co.,* (1918) 52 Utah 476 (173 Pac. 556), the traction company had obtained an increase in rates from the State Commission. The city objected to the increase on the ground that the rate was fixed by contract and could not be changed even by State authority. The Court held that the State Commission had power to change the rate but it was expressly conceded that *unless* changed by the Commission the rate was binding *as between the parties.* On this subject the Court said:

> "It is now settled law that *so long as the state does not interfere the rates agreed upon between the cities and the street railway companies in the franchise ordinance are binding and enforceable. Neither party, without the consent of the other, may disregard any rate that is agreed upon between them.*"

Similarly in *Traverse City v. Michigan Railroad Comm.* (1918), 202 Mich. 575, 168 N. W. 481, the Court said:

"This subject will be found to have been so exhaustively discussed in its various aspects and the applicable rule so plainly declared in the above cases and those cited in them that it is sufficient here to state we need not go to the extent of many of those decisions to determine in the instant case that Traverse City *was not given by its charter the power to regulate the rates* to be charged by telephone companies, that the franchise contract upon which it relies was not permissive, and, *though binding between the parties to it in the absence of governmental interposition,* is to be construed as having been entered into with reference to the *right* and *power* of the government to assert and exercise its inherent paramount authority."

The following authorities are to the same effect, holding contractual franchise rates to be binding between the parties until and when abrogated and changed by the state through the exercise of its police power:

State of Washington v. Pacific T. & T. Co. (1924), 1 Fed. (2nd) 327;

State ex rel Ellertsen v. Home Tel. & Tel. Co. (1918), 102 Wash. 196, 172 Pac. 899;

Sumpter G. & P. Co. v. City of Sumpter (1922), 283 Fed. 931;

Woodburn v. Public Service Comm. (1916), 161 Pac. 391, 82 Or. 114.

It is well settled in California that contracts fixing rates to be charged by public utilities shall be binding as between the parties until superseded by order of the Railroad Commission changing such contract rates. There are no cases involving franchise contract rates on street railroads.

In the case of *Southern Pacific Co. v. Spring Valley W. Co.* (1916), reported in 173 Cal. 291, the plaintiff sought to compel the defendant water company to continue to furnish it water under its contract and to enjoin the water company from disturbing any connections through which the water was conducted. In the course of the opinion, the Court said:

> "We perceive no valid reason for holding the contract void because opposed to public policy. It is not claimed that it was not freely made, or that it was procured by fraud or undue influence. There is nothing inherently wrong in such a contract to give water service upon payment in advance. No regulation or rule of any public authority empowered to control or regulate public water service in Alameda county had or has forbidden it. There is no claim that the taking of this water by the plaintiff has reduced the supply remaining in control of the defendants below the quantity necessary or convenient for the other consumers entitled to it or applying for it, or that the supply to plaintiffs has not been from a surplus that would have been unused but for their taking. *Where the rates for water devoted to public use have not been fixed by public authority, the person in charge of the use and the consumer may freely contract regarding the price of service and the manner of payment, and such contracts will be deemed valid by the courts and may be enforced by any appropriate mode.* (Fresno Canal etc. Co. v. Park, 129 Cal. 437 (62 Pac. 87); Stanislaus W. Co. v. Backman, 152 Cal. 725, 730 (15 L. R. A. (N. S.) 359, 93 Pac. 858); Leavitt v. Lassen Irr. Co., 157 Cal. 82, 90 (29 L. R. A. (N. S.) 213, 106 Pac. 404).)
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> * * * * * * *
>
> "Any contract purporting to give such preference in the public use, or to transfer a part of the dedicated public supply to private use, is subject to revision by competent public authority, to the end that the public service shall not be un-

justly discriminatory, or unreasonable, and that the private use shall not interfere with the public use, *and such contracts may, by such authority, be reformed accordingly, to make them conform to the public interest.* (Turtle Creek Borough v. Pennsylvania W. Co., 243 Pa. 408 (90 Atl. 194); Bellevue Borough v. Ohio V. W. Co., 245 Pa. 117 (91 Atl. 236); see, also, Fresno etc. Co. v. Park, 129 Cal. 437 (62 Pac. 87); Stanislaus W. Co. v. Backman, 152 Cal. 725 (15 L. R. A. (N. S.) 359, 93 Pac. 858).) In the case first cited it is said *that the power to fix rates and regulate public service of water devoted to public use 'carries with it jurisdiction to determine the reasonableness of charges, irrespective of prior contracts, to that extent such contracts may be reformed.' But until such public authority has intervened and modified such prior contract, it will be recognized as valid, and enforced in the courts, as declared in our decisions above cited.* The power to revise and reform contracts of public service water companies, in the interest of the public, applies as well to a contract creating or attempting to create an easement in the water held for public use as to any other disposition thereof." (Italics ours.)

In the case of *Henrici v. South Feather Land etc. Co.* (1918), reported in 177 Cal. 442, the Court had before it a suit for damages for violation of a contract to supply water for irrigating lands. The defendant company had purchased the water company and claimed it was not bound by the terms of a contract with the plaintiff. After purchasing the property defendant had put in a rate in excess of that specified in the contract which plaintiff had made with the defendant's predecessor. Plaintiff refused to pay the increased rate and the company refused to deliver water. The pertinent part of the decision is as follows:

> "The obligation to furnish water at the agreed rate was unlimited in time, *and continued until the rate was superseded by order of a public body vested with the power of regulating the service.*" (Italics ours.)

In conclusion we find that it is the unanimous holding of this Honorable Court and nurmerous other Courts, including the California Supreme Court that rates for public utility service agreed upon and fixed by contract are binding between the parties to the contract until the said rates are abrogated and changed by the state in the exercise of its police power. Until the contract rate is increased or decreased by the state it remains in full force and effect.

V. THE COURT ERRED IN HOLDING THAT THE RAILROAD COMMISSION BY ITS ORDERS OF 1921 AND 1928 ABROGATED THE RATES FIXED IN THE VARIOUS FRANCHISE CONTRACTS IN QUESTION.

A. The Commission order of 1921.

The District Court in its decision did not hold that the City of Los Angeles was without power to contract as to the rates of fare to be charged by respondent company, but to the contrary for the purpose of its decision assumed that the city possessed such power and that the franchises granted to respondent did constitute valid contracts. The Court held, however, that the permissive order of the Railroad Commission of 1921 authorizing respondent to increase its rates upon certain conditions constituted a *change* of existing contract rates and abrogated said rates agreed upon by the parties. The opinion of the Court states in part:

"We prefer to rest our decision upon the ground that even upon the assumption that the city had power to fix the utility rate by contract and that the rate provisions contained in the franchises granted to plaintiff did constitute contracts, nevertheless, the rates specified in the provisions of the franchises *have been changed by the exercise of the police power of the state.* It appears that in 1921 the Commission granted plaintiff company authority to increase its rates over the basic five cent fare which was then in force. There were in force and effect at that time 102 out of 116 franchises granted to plaintiff or its predecessors. Since May, 1921, fourteen other franchises have been granted. When the Commission in 1921 *made its order changing the basic five cent fare,* it authorized plaintiff to file with the Commission and put into effect thirty days from the date of the order, a schedule of rates increasing the then-present basic fare of five cents to six cents, and directed that tickets or tokens be put on sale. That plaintiff company did not avail itself of the right to the increase does not affect the fact that the Commission exercised its exclusive jurisdiction to regulate rates by making and finding that the rates provided for in the franchise granted to plaintiff were inadequate, and that the six cents fare authorized was a just rate. The Commission in its decision said:

" 'If adequate street railway service is to be given in Los Angeles, there appears to be no possibility for the company to secure the necessary revenue under a continuation of the flat 5-cent fare. An increase in the fare in some form, we are satisfied, should be authorized if street railway service is not to suffer and great injury is not to result to the development of the city.'

"The order authorized the company to put into effect within thirty (30) days from the date of the order a schedule of rates increasing the basic 5-cent fare to 6 cents, provided that tickets or

> tokens be put on sale at the company's offices, on the company's cars, and at such points as the company may select, in blocks of ten (10) tickets or tokens at a total cost of 50 cents for each block; and provided further that the single 6-cent fare, as also the reduced rate ticket or token fare, shall retain transfer privileges as then in existence."

The error in the conclusion of the Court is patent. The record herein shows conclusively that the Commission never "made its order changing the basic five cent fare" in 1921 or at any other time. It merely issued a permissive order which was never accepted by respondent, and which never became effective. (19 Cal. Railroad Commission Opinions and Orders 980.) The complete story of said Commission order of 1921 is found in the Affidavit of H. G. Mathewson, Secretary of the Railroad Commission (R. 347-350) and reveals that the authority granted respondent was not only not accepted, but on June 20, 1921, within the period allowed by law, a petition for rehearing on said decision was filed by respondent in which the lawfulness of the order was challenged. The petition for rehearing was set down for argument before the Commission, and removed from the calendar at the specific request of respondent company. On October 13, 1926, respondent company addressed the following letter to the Commission (R. 349):

> "In re Application No. 4238
>
> Gentlemen: The above application was dropped from the Commission's calendar, upon our request on March 14, 1922, and no further action has been taken in the matter since that date.

In view of the entire change of conditions since 1918, when Application No. 4238 was filed by this company, *we at this time request that your Honorable Commission dismiss Application No. 4238 and the matters supplemental thereto.*

Very respectfully, Los Angeles Railway Corporation by (Signed) G. J. Kuhrts, Vice President and Gen. Manager. Gibson, Dunn & Crutcher, by (Signed) S. M. Haskins, Its Attorneys."

(Italics ours)

Thereafter, on October 25, 1926, the Railroad Commission issued its Decision 17,526, providing as follows (R. 349):

"ORDER SETTING ASIDE DECISION AND DISMISSING APPLICATION

By the Commission:

Request having been made by applicant in the above entitled matter for dismissal of this application, and

Good cause appearing for the granting of said request,

It is hereby ordered that the *above entitled application being Application No. 4238, be and the same is hereby dismissed, and*

It is hereby further ordered that Commission Decision No. 9029 heretofore rendered in the above entitled matter, which decision has been suspended by virtue of the pendency of a petition for rehearing, be and the same is hereby set aside and revoked.

Dated at San Francisco, California, this 25th day of October, 1926.

H. W. Brundige, C. L. Seavey, Ezra W. Decoto, Leon O. Whitsell, Commissioners.

(Italics ours)

Hence we find that the Railroad Commission decision of 1921, which was emphasized by the Court in its opinion, was revoked and irradicated at the instance and request of applicant company. The language of the order of revocation is significant, it showing that the decision had been suspended by virtue of the pendency of petition for rehearing. We must conclude therefore that the order at all times *was fully as ineffective* as if it had never been issued, and in no manner abrogated or affected the existing franchise rates.

In considering the effect of the proceedings had before the California Railroad Commission in the application of appellee for rate increase, Application 4238, it is proper to ask this question: *What was the order of the Commission in that proceeding?* The order (Decision 17,526, supra), was one of dismissal, dismissing the entire proceeding, issued at the instance and request of applicant. True, a prior order (Decision 9029) had been issued in the proceeding which was intermediate and permissive in character, but which had never become effective. *The final order* and the one which necessarily must be controlling, was one of dismissal, effectively revoking the intermediate, ineffective and permissive order, and dismissing the entire proceeding.

It was found by the Court, and will be conceded by appellee, that the permissive order of 1921 (Decision 9029) was not accepted by the appellee. No tariffs were ever filed with the Railroad Commission by appellee pursuant to said intermediate order. The Pub-

lic Utilities Act expressly requires that new tariffs be filed with the Commission before existing rates may be changed.[3] It is well established under the authorities that rates may be changed only by strict compliance with the applicable statutory procedure. *Wichita Railroad & L. Co. v. Public Utilities Com. of Kansas, et al.*, (1922), 260 U. S. 48; *Traverse City v. Citizens Tel. Co.* (1917), 195 Mich. 374, 388; 161 N. W. 983, 988.

It should also be pointed out that the order of 1921 has never been treated by appellee as anything but a nullity. This is forcefully acknowledged in the bill of complaint herein, the plaintiff's first cause of action being predicated entirely upon the existence of franchise rates, and its second cause of action being predicated entirely upon the refusal of the Railroad Commission to change the franchise rates.

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(3) Section 15. Unless the commission otherwise orders, no change shall be made by any public utility in any rate, fare, toll, rental, charge or classification, or in auy rule, regulation or contract relating to or affecting any rate, fare, toll, rental, charge, classification or service, or in any privilege or facility, except after thirty days' notice to the commission and to the public as herein provided. Such notice shall be given by filing with the commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect. The commission for good cause shown, may allow changes without requiring the thirty days' notice herein provided for, by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published. When any change is proposed in any rate, fare, toll, rental, charge or classification, or in any form of contract or agreeemnt or in any rule, regulation or contract relating to or affecting any rate, fare, toll, rental, charge, classification or service, or in any privilege or facility, attention shall be directed to such change on the schedule filed with the commission, by some character to be designated by the commission, immediately preceding or following the item. (California Stats. 1915, p. 115.)

The final and conclusive reason why the order of 1921 was ineffective for all purposes, lies in the fact that it was expressly made so under the provisions of Section 66 of the Public Utilities Act.[4] The record

(4) Sec. 66. "After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder, or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in said action or proceeding and specified in the application for rehearing, and the commission may grant and hold such rehearing on said matters, if in its judgment sufficient reason therefor be made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless such corporation or person shall have made, before the effective date of said order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in said application. Any application for a rehearing made ten days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before such effective date, or the order shall stand suspended until such application is granted or denied. Any application for a rehearing made within less that ten days before the effective date of the order as to which a rehearing is sought, and not granted within twenty days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of dependency of the application. If any application for a rehearing be granted without a suspension of the order involved, the commission shall forthwith proceed to hear the matter with all despatch and shall determine the same within twenty days after final submission, and if such determination is not made within said time, it may be taken by any party to the rehearing that the order involved is affirmed. An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission may by order direct. If, after such rehearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission shall be of the opinion that the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change or modify the

shows that the 1921 order was dated May 31, 1921, and authorized the filing of proposed rules, regulations and rates, thirty days from the date of said order, and further the record shows that the appellee company filed its petition for rehearing with the Railroad Commission ten days before the said effective date, to-wit: on June 20, 1921 (R. 348). Under the terms of Section 66 of the Public Utilities Act, supra, it is provided in part at "any application for a rehearing made ten days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before such effective date, or the order shall stand suspended until such application is granted or denied." The petition for rehearing not having been granted or denied before the effective date provided in said order, it follows that the order was suspended and never became effective.

In ruling that the Railroad Commission order of 1921 abrogated the rates fixed by the various franchises in question the Court relied on the decision of this Honorable Court in *Denney v. Pacific T. & T. Co.* (1928) 276 U. S. 97, 100. In that case the Court had before it appeals by defendants from decrees of the United States District Court for the Western District of Washington enjoining the enforcement of rates for telephone service alleged to be confiscatory.

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same. An order or decision made after such rehearing abrogating, changing or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission." (California Stats. 1915, p. 115.)

On appeal defendants contended that the United States District Court was without jurisdiction to give the injunctive relief granted inasmuch as the plaintiff telephone companies were operating under certain contractual franchises in which maximum permissive rates were fixed. The Court properly rejected this contention and held that the decree of the lower Court was sound, *it appearing that the Department of Public Works of the State of Washington, pursuant to statutory authority had issued its order in 1923 abrogating the franchise rates and approving as just and reasonable rates theretofore fixed by the Postmaster General in Federal control in 1919, which rates were of a higher level than those provided in the contracts.* The opinion states in part (p. 300):

> "The order of March 31, 1923, in effect declared the rates then being observed just and sufficient to yield reasonable compensation. It expressly commanded their future observance and was sufficient to terminate the provisions of the franchises as to maximum rates within the purview of Section 55, supra."

It is evident that the ruling of this Honorable Court in the *Denney* case, supra, is of no significance in the instant case inasmuch as the facts now before the Court show that the California Railroad Commission order of 1921 did not abrogate or terminate or affect in any manner whatsoever the rates established in the contractual franchises.

We again refer to the holdings of this Honorable Court in *Southern Utilities v. City of Palatka,* supra, and in *Henderson Water Co. v. Corporation Commission of the State of North Carolina,* supra. In

each of these decisions it was clearly pointed out that rates of fare fixed in contractual franchises should continue in effect and be inviolable as between the parties until and when said rates are changed and abrogated by the State in the exercise of its superior power. In *Southern Utilities v. City of Palatka,* this Court said (p. 233):

> "The supreme court held that the city had power to grant the franchise and to make the contract, and that it had no power, of its own motion, to withdraw, but it concedes the unfettered power of the legislature to regulate the rates. On that ground the defendant contends that there is a lack of mutuality, and therefore that it is free, and cannot be held to rates that, in the absence of contract, it would be unconstitutional to impose. The argument cannot prevail. Without considering whether an agreement by the company in consideration of the grant of the franchise might not bind the company in some cases, even if it left the city free, it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties *when it is left undisturbed.*" (Italics ours.)

In *Henderson Water Co. v. Corporation Commission of the State of North Carolina,* supra, this Court in considering the nature and extent of said action required to abrogate contract made rates said:

> "* * * when the Water Company applied to the Corporation Commission for an order increasing rates, it was bound by the terms of a contract with the city contained in its franchise, to furnish water at a low schedule of rates fixed therein. It was not entitled to any judicial relief from this situation, however inadequate the rates. Columbus R. Power & Light Co. v. Columbus, 249 U. S. 399; 63 L. ed. 669, 6 A. L. R. 1648, P. U. R.

1919D, 239, 39 Sup. Ct. Rep. 349; St. Cloud Pub. Serv. Co. v. St. Cloud, 265 U. S. 352, 68 L. ed. 1050, 44 Sup. Ct. Rep. 492. *Only by securing the waiver of the franchise rates by order of the corporation commission speaking for the state, did the Water Company have any standing to ask for a fixing of rates in excess of the franchise rates.*" (Italics ours.)

The *Henderson* case was a strong case indeed, compared with the instant case. In that case a *partial* waiver of the contract rate had been granted by the Corporation Commission; yet this Court, in sustaining the ruling of the Federal District Court, held that such partial change was insufficient to abrogate the franchise contract rate, and that nothing short of a final waiver of said contract rate would suffice to give the Federal Court jurisdiction to relieve against confiscation.

The Railroad Commission order of 1921 having "left undisturbed" the contractual franchise rates, we respectfully submit that the District Court was in error in holding that the said rates were *changed* by the state in the exercise of its police power so as to give the District Court jurisdiction to grant the injunctive relief allowed.

B. The Commission order of 1928.

The District Court further held that the Railroad Commission order of 1928 (R. 165) denying application of appellee for a rate increase resulted in the abrogation of the franchise contract rates. The Court stated in part (R. 543):

"Furthermore, we are of opinion that the proceeding before the Railroad Commission (No.

13323) out of which the present suit grew, must be held to have been a complete exercise by the Commission of its power over the rate specified in the franchises granted to plaintiff. How could it be otherwise? The Commission received and considered original and supplemental applications for an increase made by plaintiff. It carried on an extensive investigation lasting from November, 1926, until March, 1928, when it made its finding that the five cent fare allowed to plaintiff was not an unreasonable return, and that under that rate and the method of operation for the year ending December 31, 1927, the return was approximately 4.9 per cent. The finding of the Commission rested upon detailed figures concerning the valuation of plaintiff's property. The practical result of the conclusion and order of the Commission was to prevent the company from obtaining a fair return upon its property invested in the public service. Its order was none the less effective in denying permission to raise an existing rate inasmuch as the necessary effect was to enforce the existing rate, which would effect confiscation of plaintiff's property (Miss. R. R. v. M. & O. R. R., 244 U. S. 388)."

We respectfully submit that the fact that the Railroad Commission of California exercised its statutory and constitutional authority in considering whether the franchise rates should be abrogated and increased and thereafter issued its order denying an increase is not material to a determination of the jurisdictional question now presented. Under the holdings of this Court in *Southern Utilities v. City of Palatka,* supra, *Henderson Water Co. v. Corporation Commission of the State of North Carolina,* supra, and *Denney v. Pacific T. & T. Co.,* supra, the contractual franchise rates are binding upon the parties, and the Federal Court is without jurisdiction in the premises

unless and until the contract rates are *abrogated* or *terminated* through the direction of increased or reduced rates.

The franchise contract rates in question could be abrogated only by a *"showing before the Railroad Commission and a finding by the Commission that the increase is justified."* (Secs. 27 and 63 of the Public Utilities Act, supra.) The Railroad Commission under its opinion and order on application of appellee for a rate increase (R. 165) found that there was no showing justifying the proposed increase and refused to make its finding authorizing said proposed increased rate. This Honorable Court in *Wichita Railroad & L. Co. v. Public Utilities Com. of Kansas, et al.* (1922), 260 U. S. 48, expressly held that the order of a state regulatory body purporting to increase contract rates will not abrogate an existing contract for public utility service unless the Commission order complies in every particular with the requirement of the state statute governing such orders. In that case two utilities operating in Kansas had contracted for the sale and purchase of power at certain rates. The Public Utility Commission of Kansas, on complaint of one of the utilities, issued its order granting an increase in the contract rate. The utility resisting the increase instituted proceedings in the United States District Court and enjoined the Commission from putting in force the increased rate authorized. On appeal the Circuit Court reversed the decree. On appeal to this Honorable Court the ruling of the District Court was upheld. The order of the Commission was held to be void,

there being no express finding therein that the existing rates were unreasonable or unjust, as required by the state statute. Section 13 of the Public Utility law of Kansas provided:

> "It shall be the duty of the Commission, either upon complaint or upon its own initiative to investigate all rates, fares, * * * and if after full hearing and investigation the Commission shall find that such rates * * * are unjust, unreasonable, unjustly discriminatory or unduly preferential, the Commission shall have power to fix and order substituted therefor such rate or rates * * * as shall be just and reasonable."

This Court stated in its decision:

> "The proceeding we are considering is governed by Sec. 13. That is the general section of the act comprehensively describing the duty of the Commission, vesting it with power to fix and order substituted new rates for existing rates. The power is expressly made to depend on the condition that, after full hearing and investigation, the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory, or unduly preferential. We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that, for lack of such a finding, the order in this case was void."
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> "In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. * * * When, therefore such an administrative agency is required, as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

In ruling that the contract rate had not been lawfully changed the Court approved the ruling of the Supreme Court of Kansas in *Kaul v. American Independent Teleph. Co.* (1915), 95 Kan. 1, 147 Pac. 1130; and quoted the following portion of the decision in that case:

> "While that Commission is vested with broad regulatory powers, it is not shown nor claimed that it has found the contract rates to be unreasonable. Granting, without deciding, that the Commission has the power, under the law, to determine whether or not the rates prescribed by the contract are reasonable and valid, and to revise them if found to be unreasonable, it does not appear that it has exercised the power, nor that they have been presented to it for its consideration. The passage of the act did not automatically overthrow contracts nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the Public Utilities Commission abrogate the contract. *In any event, rates previously agreed upon between utilities and patrons will continue in force until the Commission has found them to be unreasonable, and has prescribed other rates.*" (Italics ours.)

In conclusion we find that in the instant case the franchise contract rates were never effectively abrogated by the California Railroad Commission, there being no showing before the Commission or "finding by the Commission that such increase is justified." Under the many authorities above cited there can be no question of confiscation so long as the contract rates are not abrogated. It is only when contract rates have been changed by the State and they thus become statutory rates that the question of confisca-

tion can arise. The contract rates having never been abrogated, the District Court of Appeal was without power or authority to relieve against alleged confiscation.

If appellee was entitled to a change of its franchise contract rates it was solely because of the statutory right given to it by the State under Sections 13, 27 and 63 of the Public Utilities Act above quoted, and not because of the 14th amendment to the Federal Constitution. Appellee believing the order of the Railroad Commission denying a rate increase to have deprived it of its statutory rights granted under the above cited provisions of the Public Utilities Act of California could, and should have proceeded in the highest Court of the State, the California Supreme Court, and there sought to compel the Railroad Commission to exercise its police power to abrogate the contract rates. Under Section 67 of the Public Utilities Act appellee could have proceeded before the California Supreme Court on a petition for writ of review (certiorari) and there obtained a ruling as to the lawfulness of the order in question.[5] That Court could have determined

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(5) Section 67 of the Public Utilities Act of California provides:

"Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the supreme court of this state for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return

whether the Commission had regularly pursued its authority, and could have effectively protected the statutory rights enjoyed by appellee. It should also be noted that under the provisions of Section 67 of the Public Utilities Act a writ of mandamus will lie from the Supreme Court to the California Railroad Commission in all proper cases.

CONCLUSION.

In conclusion we respectfully submit that we have shown that the numerous franchise agreements

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day, the cause shall be heard by the supreme court, unless for a good reason shown the same be continued. No new or additional evidence may be introduced in the supreme court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the supreme court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure of this state relating to writs of review shall, so far as applicable and not in conflict with the provisions of this act, apply to proceedings instituted in the supreme court under the provisions of this section. No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, that the writ of mandamus shall lie from the supreme court to the commission in all proper cases." (Stats. 1915, p. 115.)

granted by the City of Los Angeles to appellee under which appellee's street car operations are being conducted, constitute binding contracts between the parties; that the rate of fare provisions included in said franchises were inserted pursuant to specific statutory authority granted by the State of California to the City of Los Angeles; and that neither the contractual franchises nor the maximum rate of fare provisions which they contain have ever been changed or modified by the California Railroad Commission or by any other instrumentality of the State.

We further submit that under the unanimous holdings of this Honorable Court and numerous other Courts, above cited, the contract franchise rates of fare agreed upon are binding between the parties until changed and abrogated by the State in the exercise of the police power of the State. If the appellee Los Angeles Railway Corporation is entitled to a change in the existing contract rates of fare it is by virtue of the statutory rights granted under Sections 13, 27 and 63 of the Public Utilities Act and not because of any federal constitutional rights. Until and when the State of California, through the California Railroad Commission, does abrogate said contract rate of fare provisions, the Federal Courts are without power or authority to relieve appellee against any alleged confiscation—there being no confiscation where there is a binding contract.

We further submit that it has been shown that the District Court erred in holding that the Railroad Commission by its orders of 1921 and 1928 abrogated the franchise contract rates of fare provisions, and

that the Court therefore erred in issuing its injunctive decree against appellant. It is respectfully submitted that the decree should be reversed.

Dated, San Francisco,
September 7, 1929.

ARTHUR T. GEORGE,
IRA H. ROWELL,
RODERICK B. CASSIDY,
Attorneys for Appellant,
Railroad Commission of the
State of California.